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SUPREME COURT OF THE UNITED STATES

October Term, 1994

LIZZIE DURDEN, in her capacity as Administratrix of the Estate of Mary Freeman, deceased

Petitioner,

vs.

DEKALB COUNTY, GEORGIA

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Georgia

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PETITION FOR A WRIT OF CERTIORARI

E. CATHERINE KIMMEL
Counsel of Record
4309 Bethesda Trail
Dunwoody, GA 30338
(404) 396-6764

JAMES F. STOVALL III
King, Taylor & Stovall
Post Office Box 646
Tucker, GA 30085-0646
(404) 491-7200

GARY C. HARRIS
Gary C. Harris, P.A.
Post Office Box 1190
Clayton, GA 30525
(404) 945-6693

Attorneys for Petitioner

75 pp

QUESTIONS PRESENTED:

1. After a final judgment ruling that Lizzie Durden was the owner of certain real property which then had improvements constructed thereon by DeKalb County, did the ruling of the Supreme Court of Georgia in a separate, subsequent condemnation action between the same parties - that Ms. Durden was not entitled to compensation for such improvements - violate her rights under the Fifth Amendment to the Constitution that no private property shall be taken without just and adequate compensation.

2. After a final judgment ruling that Lizzie Durden was the owner of certain real property which then had improvements constructed thereon by DeKalb County, did the ruling of the Supreme Court of Georgia in a separate, subsequent condemnation action between the same parties - that Ms. Durden was not entitled to compensation for such improvements - violate her rights under the Fourteenth Amendment to the Constitution that no person shall be deprived of property without due process of law.

3. After a final judgment ruling that Lizzie Durden was the owner of certain real property which then had improvements constructed thereon by DeKalb County, did the ruling of the Supreme Court of Georgia in a separate, subsequent condemnation action between the same parties - that Ms. Durden was not entitled to compensation for such improvements - violate her rights under the Fourteenth Amendment to the Constitution that

no one shall be denied the equal protection of the laws; it appearing that the Supreme Court of Georgia has created a class of defendant (i.e., entities who possess the power of eminent domain) which class is immune from the well-recognized common-law doctrine of *res judicata*.

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PETITION FOR WRIT OF CERTIORARI

No.

In The

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October, 1994 Term

LIZZIE DURDEN, in her capacity as Administratrix of the Estate of Mary Freeman, deceased

Petitioner,

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DEKALB COUNTY, GEORGIA

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Georgia

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Lizzie Durden[1], as Administratrix of the Estate of the Mary Freeman, deceased, respectfully prays that a Writ of Certiorari issue to review the decision of the Supreme Court of Georgia entered in the above-entitled case on February 28, 1994, Motion for Reconsideration denied on March 18, 1994.

OPINIONS BELOW

The decision of the Court below written by Justice Leah Sears-Collins affirming the Order of the Superior Court of DeKalb County has been published at 264 Ga. 34, 440 S.E.2d 170 (1994). It appears as App. III, pp. 4a - 10a. The opinion of the Superior Court of DeKalb County entered on November 20, 1992 granting partial summary judgment in favor of Respondent DeKalb County was not published. It appears as App. IV, pp. 12a-20a.

STATEMENT OF JURISDICTION

The opinion of the Supreme Court of Georgia was entered and filed on February 28, 1994. Petitioner's Motion for Reconsideration was denied on March 18, 1994. Petitioner submits this timely Petition for a Writ of Certiorari to the Supreme Court of Georgia. The jurisdiction of this Court rests on 28 U.S.C. § 1257 and § 2101(c).

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[1] See Appendix XI (page 46a) for a list of all parties to this action.

THE CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this case are the due process of law clause and the prohibition of taking private property for public use without just compensation of the Fifth Amendment as made applicable to the states through the Fourteenth Amendment. The Fifth Amendment states in part:

> ...nor [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. V.

Section 1 of the Fourteenth Amendment states in part:

> ...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

U.S. CONST. AMEND. XIV, SECT. 1.

The judicial power clause of Article III of the Constitution which states:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution...

U.S. CONST. ART. III, SECT. 2.

STATEMENT OF THE CASE

In 1984, Lizzie (Freeman) Durden's family had owned the 50-acre tract north of Lithonia for almost forty years. During that time, they had farmed on the tract, used it for pasture and had sold off lots along the road frontage. Unbeknownst to them in 1959, a person named George Anderson filed a real property tax return with the DeKalb County Tax Commissioner claiming to own 30 acres of the Freemans' remaining property.[2] As a result of the tax return, the Tax Commissioner sent the tax bills on the 30-acre tract to George Anderson from 1959 until 1976.

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[2] George Anderson may have been the nephew of Dr. B.F. Anderson, the person who sold the subject property in question to the Freemans in 1945. The George Anderson who was a nephew of B.F. Anderson was not an heir of Dr. B.F. Anderson and there is no document recorded in the real estate records which purports to convey an interest in the subject property to George Anderson.

Because the 1974 and 1975 taxes on the 30-acre tract were not paid, the Tax Commissioner commenced procedures to have the 30-acre tract sold for back taxes totalling $780.00. This sale was conducted in January of 1976. DeKalb County entered a bid of $780.00 at the public sale and was the highest and best bidder. At the time of the sale, the 30-acre tract was carried on the DeKalb County tax digest with a fair market value in excess of $30,000.00. During the procedure of the tax sale, notice of the tax sale was mailed to the last known address of George Anderson and the published advertisements indicated that the property was being sold as the property of George Anderson. No party to this action claims that Mary Freeman was notified of the sale as the County assumed the title to the land was in George Anderson.[3]

During the period from 1976 until 1987, the land in question was open and unoccupied. In 1982, DeKalb County caused an affidavit to be filed in the real estate records stating that it had purchased the property at the tax sale and that the period for redemption had expired.

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[3] Jim and Mary Freeman were the parents of Lizzie Durden. They received the deed to the subject property from Dr. Anderson in 1945. Jim died intestate in 1970 and his children conveyed their interest which they inherited from Jim to their mother Mary by quitclaim deed dated and filed in 1981. Mary Freeman subsequently died in 1985 as the sole owner of the 30-acre tract and Lizzie Durden has prosecuted this and the former case as the Administratrix of her mother's estate.

The purpose of this affidavit was purportedly to cut off the rights of the owners of the property to redeem the property from the tax sale.

In 1984, Robert Broome entered into negotiations with the County to purchase the 30-acre tract. During the course of negotiations, Broome had a title insurance company and his own private attorney check the title to the land. Their searches revealed no deed into George Anderson who was the County's grantor, but their search did reveal the deed into Jim and Mary Freeman. Based upon this search, it was recommended that DeKalb County get a quitclaim deed from Mary Freeman in order to "cure" the County's "title". When Broome's attorney approached Mary Freeman in 1984 and asked her to sign a quitclaim deed in favor of DeKalb County, Mrs. Freeman declined to sign the deed and stated that she, not DeKalb County, was the owner of the 30-acre tract. Mrs. Freeman died in 1985 and her daughter Lizzie Durden as Administratrix filed a suit in ejectment in January of 1987 seeking a determination that the property was owned by the Freeman family and not by DeKalb County under its tax deed. In the ejectment action, Lizzie Durden set forth at least two reasons why the tax deed was void.

First, the deed was void because of an excessive levy. When the tax fi.fa. is entered against an open tract of land which is subject to being subdivided, it is illegal for the Sheriff to levy on the entire tract when a levy on a small portion of the tract would satisfy the indebtedness. Second, the tax deed was void because the tax deed

conveys only the interest of the defendant in fi.fa., George Anderson. Because there is no evidence of George Anderson having any ownership interest in the tract of land[4], the tax deed conveyed to the County only the interest of George Anderson which was apparently non-existent.

During the pendency of the ejectment action, almost nine months after it was filed, DeKalb County moved onto the 30-acre tract and began constructing a garbage processing facility. In December of 1987, the trial court denied DeKalb County's Motion for Summary Judgment. When that ruling was entered, DeKalb County then hired a title expert to review the title. In February of 1988, that title expert's report was delivered and that report indicated that the title was vested in the heirs of B.F. Anderson.[5] The County continued to build on the property and completed its construction in November of 1989. In January of 1990, the trial court entered summary

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[4] Georgia law is quite clear that paying taxes on a piece of land, no matter for what length of time, does not rise to any type of prescriptive title. Mitchell v. Gunter, 170 Ga. 135, 146, 152 S.E. 466 (1930).

[5] The dispute between the heirs of B.F. Anderson and Lizzie Durden was resolved by the Georgia Supreme Court in Lizzie Durden's favor in Companion Case No. S94A1708 (see App. III, pg. 7a). The effect of the ruling was to disregard the County's title report and rule in favor of the deed from Dr. B.F. Anderson to the Freemans which is the basis of Lizzie Durden's claim to the property.

judgment in favor of Lizzie Durden. This judgment ruled that as between the parties to the case, Lizzie Durden had the superior title to the subject property and she was granted a writ of possession to the entire 30-acre tract, including the 7 acres upon which the County had built the garbage processing facility. This ruling was appealed to the Supreme Court of Georgia and it was affirmed without written opinion pursuant to its Rule 59. See *DeKalb County v. Durden*, 260 Ga. xxviii, 396 S.E.2d 784 (1990).

By the time of the ruling of the state supreme court, DeKalb County had begun operations of the garbage processing facility. When the ruling of the Supreme Court became final and the remittitur was returned to the trial court and the writ of possession issued in favor of Lizzie Durden, DeKalb County instituted the instant proceedings in the Superior Court of DeKalb County to condemn and take by eminent domain the seven acres upon which they had built a garbage transfer station.

At the hearing before the special master, Lizzie Durden claimed compensation not only for the value of the land taken by the County but also for the improvements which had been placed on the land by DeKalb County during the pendency of the previous ejectment action. The issue went before a special master and the special master found that Lizzie Durden was not entitled to receive compensation for the value of the improvements placed upon her land. Lizzie Durden filed exceptions to the findings of the special master and

appealed the issues to the Superior Court of DeKalb County. DeKalb County filed its motion for partial summary judgment seeking a ruling that Lizzie Durden was not entitled to compensation for the value of the improvements which DeKalb County had placed upon her land during the pendency of the ejectment action. This matter was argued before the Honorable Carol W. Hunstein in September of 1992. In November of 1992, Judge Hunstein entered an Order granting the motion for summary judgment.[6] Lizzie Durden appealed the Order granting partial summary judgment to the Georgia Court of Appeals. After briefs were filed in the Georgia Court of Appeals, but before oral argument and on motion of the parties, the Georgia Court of Appeals transferred the appeal to the Supreme Court of Georgia in order that it might be consolidated with the appeal of a separate order which was then pending in the Supreme Court of Georgia. On February 28, 1994, the Supreme Court of Georgia entered its ruling which is set forth in totality on page 5a of the Appendix. Petitioner moved for reconsideration of the judgment and the motion was denied on March 18, 1994 (see page 3a). Pursuant to Application of the Petitioner, the Supreme Court of Georgia entered an

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[6] A copy of the Order is set forth in Appendix IV at Page 15a. Judge Hunstein was elevated from the bench of the DeKalb Superior Court to the bench of the Supreme Court of Georgia and this Order was one of the last orders which she entered as a superior court judge. Please note that she entered the Order on a form which had been provided to her by the DeKalb County attorney.

order on March 23, 1994 staying the remittitur pending this Petition to this Honorable Court (page 1a).

The ruling of the Supreme Court of Georgia affirmed the trial court's grant of partial summary judgment to DeKalb County ruling that Lizzie Durden was not entitled to compensation for the value of her improvements which were being taken in the condemnation action. The Supreme Court of Georgia based this decision on the authority of *Searl v. School District No. 2*, 133 U.S. 553, 10 S.Ct. 374, 33 L.Ed. 740 (1880).

PRESENTATION OF FEDERAL QUESTIONS IN EARLIER PROCEEDINGS

This case raises three constitutional questions:

1. Whether the refusal to apply the doctrine of *res judicata* to the judgment in the previous ejectment action constitutes a denial of due process as is required under the Fourteenth Amendment to the Constitution of the United States.

2. Whether the refusal to apply the doctrine of *res judicata* to the judgment in the previous ejectment action constitutes a denial of "equal protection of the laws" by creating a class of defendant (i.e., those entities who possess the power of eminent domain) who are not only exempt from the law of improvements made by trespassers on the land of another, but also the doctrine of *res judicata*.

3. Whether the ruling that Condemnor DeKalb County does not have to pay Petitioner for the value of the improvements on her land constitutes a denial of her constitutional right under the Fifth Amendment which states that no private property shall be taken for public purpose without just and adequate compensation.

Petitioner raised the issue of her right to just and adequate compensation under the Constitution in the trial memorandum and the post-hearing brief filed with the Special Master. Excerpts from these arguments are set forth at pages 35a and 37a. The issue of *res judicata* was raised in oral argument before the trial court on DeKalb County's motion for partial summary judgment on the issue of compensation for the improvements[7] and was alluded to in a post hearing letter brief written to the trial court. (See Appendix IX, page 41a)

In the brief before the Supreme Court of Georgia[8], the Petitioner argued that the prior judgment awarding the improvements to her was *res judicata* (see excerpt of

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[7] No transcript of this oral argument is available at this time.

[8] The brief was actually filed in the Court of Appeals of Georgia. The case was transferred to the Supreme Court of Georgia to consolidate it with another appeal arising from the same case prior to oral arguments being presented. The case was decided by the Supreme Court of Georgia as Case No. S94A0056 (see pg. 5a et seq.)

brief at page 24a). Petitioner also raised the issue of the constitutional requirement that no private property may be taken for public use unless just and adequate compensation is paid (see excerpt from brief at page 24a).

The Supreme Court of Georgia based its ruling in the case solely on the grounds that their decision was in accordance with the ruling of this Honorable Court in the case of *Searl v. School District No. 2*, 133 U.S. 533, 10 S.Ct. 374, 33 L.Ed. 740 (1880) (see page 5a of the Appendix). Apparently, the Supreme Court of Georgia decided that by basing its decision upon a decision of this Honorable Court, it would "automatically" pass constitutional muster.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. LAW OF IMPROVEMENTS MADE BY TRESPASSERS.

The common law maxim of Quicquid plantatur solo, solo cedit ("Whatever is affixed to the realty is thereby made part and parcel thereof and belongs to the owner of the soil.") was a harsh rule and very early on it was modified by equity to protect innocent trespassers who made improvements on the lands of others. These equitable doctrines were incorporated into Georgia statutory law in 1873 and are now set forth in OCGA § 44-11-9.

Current Georgia law provides that when a trespasser is sued in ejectment, the trespasser has a right to counterclaim for the value of improvements he has placed upon the subject property and if the jury finds that the improvements were made in good faith that the defendant is entitled to compensation for such improvements. OCGA § 44-11-9.

A corollary to this principle has developed in the Georgia courts that improvements made by a trespasser during the pendency of an ejectment action are ipso facto not made in good faith and that the trespasser is not entitled to compensation for the value of the improvements. (*Harper v. Durden*, 177 Ga. 216, 170 S.E. 45 (1933); *Zugar v. Tn. A&G Ry. Co.*, 65 Ga. App. 658, 16 S.E.2d 149 (1941) *rev'd. on other grounds* 193 Ga. 386, 18 S.E.2d 758 (1942).

In the case before the Court, Durden filed her suit in ejectment against DeKalb County in January of 1987 when the subject property was open and unoccupied. During the pendency of the ejectment action and some nine months after it was filed, DeKalb County moved onto the subject property and began making improvements. At no time did DeKalb County seek to file any claim with the court for the value of the improvements it was placing on Ms. Durden's land. In January of 1990, two months after the improvements were complete, the DeKalb Superior Court granted Ms. Durden's ejectment petition on summary judgment. The legal effect of the ruling was to decide that as between the parties to the action, Lizzie Durden had better title than

the County. DeKalb County appealed this ruling to the Supreme Court of Georgia and the ruling was affirmed pursuant to its Rule 59 without opinion (see *DeKalb v. Durden*, 260 Ga. xxviii, supra.)

Georgia law is quite clear that a final judgment in ejectment is conclusive as against all parties to the case and their privies and successors in title. OCGA § 44-11-13, 9-12-40. Even more so, the final judgment in ejectment concludes all matters in issue and all matters which might have been put in issue. OCGA § 9-12-40. (See generally Pindar, *Georgia Real Estate Law & Proc.*, § 23-128 (4th ed.; The Harrison Co., 1993)).

DeKalb County eschewed its right to seek compensation for the value of the improvements in the ejectment case. When the judgment in ejectment became final, Lizzie Durden was the fee simple owner of the entire 30-acre tract which included the seven (7) acres where the County had built its garbage transfer station. The County then tried to avoid the principle of *res judicata* by filing the instant condemnation action against Ms. Durden and using its perverted interpretation of *Searl, supra* to avoid the bar of *res judicata* and to take back its improvements without compensation to Ms. Durden.

The Supreme Court of Georgia has accepted DeKalb County's misinterpretation of *Searl,* even though it violates Ms. Durden's constitutional rights. Allowing the County to take the improvements on Ms. Durden's land without compensation violates the Fifth Amendment

to the United States Constitution which holds that no private property may be taken for public purposes without just and adequate compensation.

Ignoring the principle of *res judicata* to permit the County to re-litigate the issue of good faith versus bad faith in the condemnation action is a denial of due process as is required by Section 1 of the Fourteenth Amendment to the United States Constitution.

Lastly, by creating a class of trespassers who may re-litigate the issue of the value of the improvements they have placed on property after they have suffered an adverse judgment in an ejectment action (i.e., entities which possess the power of eminent domain) and not be barred by the principle of *res judicata* is a denial of equal protection of the laws as provided under Section 1 of the Fourteenth Amendment to the United States Constitution. No rational or permissible basis has been shown for such a classification.

II. THE EFFECT OF THE DECISION OF THE SUPREME COURT OF GEORGIA WHICH RULED THAT DEKALB COUNTY DID NOT HAVE TO PAY LIZZIE DURDEN FOR THE VALUE OF THE IMPROVEMENTS WHICH ARE LOCATED ON HER LAND CONSTITUTES A TAKING OF PRIVATE PROPERTY FOR A PUBLIC PURPOSE WITHOUT COMPENSATION IN DEROGATION OF THE FIFTH AMENDMENT.

The constitutional provision that "private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid..." is a universally recognized principle that forms the basis of the law of eminent domain.[9]

This principle is the cornerstone of the rights of the private property owner in relation to his government, and it is recognized in the Constitution of every state and the United States. The Constitutions of Georgia and the United States did not create a new right by including the eminent domain provision, but they merely declared a common law principle that existed in all republican governments before the adoption of either constitution.[10]

The condemnees whose land has been taken by eminent domain must be compensated for all losses and damages for:

> ...Every species of property, real and personal, corporeal and incorporeal. *Bowers v.*

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[9] Georgia Constitution 1983, Art. I, § III, ¶ 1. This language is substantially the same as that contained in the Fifth Amendment of the Constitution of the United States.

[10] Pursley, *Eminent Domain*, § 1-1 (1993 ed. The Harrison Co.) citing 1 Blackstone's Commentaries, 139, 140; 3 Story's Commentaries 661.

Fulton County, 221 Ga. 731,
146 S.E.2d 884 (1966).

As of the date that the eminent domain proceedings were instituted, Lizzie Durden was the owner of the entire 30-acre tract as well as all fixtures and improvements thereon. This was the legal effect of the ruling in the prior ejectment case of *DeKalb County v. Durden, supra*. Ms. Durden's rights under the Fifth Amendment of the United States Constitution are in no way diminished because of the way in which she acquired the property which the county was taking in its condemnation action. There is no authority for the proposition that a person's Fifth Amendment rights protecting against a taking without compensation are in some way conditioned upon whether the property was received for value, by gift, by forfeiture, by dishonest means or in any other way. Once the courts of this state have made a final judgment that the property is the legal property of Ms. Durden[11], neither this state nor its political subdivisions can take that property from Ms. Durden without first paying her just and adequate compensation.

This writer has made an exhaustive search of cases involving the same or similar issues and it knows of none[12]

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[11] As they did in the case affirmed by the Supreme Court of Georgia in 1990; *DeKalb, supra.*

[12] Apparently DeKalb County has also not been able to cite a case in any of the previous proceedings

that stand for the proposition that once parties to a dispute have litigated the title of land and improvements thereon to a final conclusion, that the losing party may then institute condemnation proceedings against the winning party and take property which was the subject matter of the previous title litigation by means of eminent domain without compensating the owner of the property for its value as is required under the Constitutions of the United States and the State of Georgia.

This attempted encroachment upon this sacred right[13] cannot be tolerated by this Honorable Court or any other court.

In order to sustain Ms. Durden's right to receive just and adequate compensation for her property which is being taken for a public purpose, this Court should grant the application for writ of certiorari.

III. *SEARL* IS NOT CONTROLLING BECAUSE IT, UNLIKE THE PRESENT CASE, DID NOT INVOLVE A PRIOR JUDGMENT IN THE EJECTMENT ACTION.

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along these lines.

[13] The Constitution of the State of Georgia states "protection to person and property is the paramount duty of government and shall be impartial and complete..." Georgia Constitution 1982, Art. I, § I, ¶II.

The Supreme Court of Georgia is resting its decision to deny the value of the improvements to Ms. Durden on the holding in *Searl*.[14] Apparently, that Court assumes that by citing a holding of this Honorable Court, it thus clears all constitutional issues that were raised. Its ruling lays waste to the revered and ancient concept of *res judicata*.

The *Searl* case has many factual distinctions from the present case and the Supreme Court of Georgia has misapplied *Searl* in relying upon it as a means of reaching its decision.

In the instant case, the county was sued for ejectment. It later went on the land and made its improvements and then suffered a final judgment in ejectment. After the final judgment of ejectment was entered, then the County sought to institute eminent domain proceedings and seek refuge in its imperfect reading of *Searl*.

By contrast in the *Searl* case, the school district bought the land in question when it was aware of the title dispute but relied upon the opinion of its reputable attorneys. While the school district was constructing the schoolhouse, it received notifications from Searl in which he asserted his title to the property and warned the school district that they were placing the improvements on the

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[14] For a complete list of the factual distinctions between *Searl* and the instant case, see Appendix X, page 43a.

land at their peril. Sometime after the schoolhouse was complete, it became clear that Searl's claim was superior to that of the school district. Searl filed a suit in ejectment against the school district. Rather than litigate the ejectment action to a final judgment, the school district sought and received an order enjoining the ejectment action so that it could institute eminent domain proceedings against Searl to acquire his interest. It was during the eminent domain proceedings that were held before the final judgment in the ejectment action that this Honorable Court ruled that the school district would be required to pay for the value of the land alone and not the value of the improvements.

The apparent failure of the Supreme Court of Georgia to apply the doctrine of *res judicata* rises to constitutional violations as is set forth hereinafter.

IV. REFUSAL TO APPLY DOCTRINE OF *RES JUDICATA* AS A VIOLATION OF DUE PROCESS.

"Probably the dominant characteristic of the Anglo-American system of adjudication is its unity. Cases and decisions do not stand alone; they are part of a continuum. A court does not face a legal problem as a new, pristine blackboard, "never writ upon". Decisions are mirrors of past decisions and, in turn, are reflected in

decisions of the future. The continuum can no more be broken than reflecting mirrors be interrupted.[15]

"The constitutional and statutory provisions establishing "full faith and credit" also are expressions of this continuing nature of the judicial process. The United States Constitution provides that "Full faith and credit shall be given in each state to the...judicial proceedings of every other state..." The supplementing provision of the United States Code provides that the records and judicial proceedings of any court of any state, territory or possession of the United States:

> 'shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such state, territory or possession from which they are taken.'"
>
> 28 U.S.C. § 1738.

"This suggests, first, that a judicial proceeding within a state has an effect upon subsequent proceedings in courts within that state."[16]

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[15] Vestal, *Res Judicata/Preclusion*, p. V-3 (Matthew Bender 1969).

[16] *id.* at pg. V-4 (emphasis supplied).

For more than half of a thousand years, this interaction between separate proceedings involving the same or similar parties and issues has been called "*res judicata*", thing adjudged. The doctrine of *res judicata* serves many purposes. First, the doctrine serves to establish rights of individuals. This involves a desire to settle controversies and settle them in the most expeditious manner possible. People who have engaged in a formal adjudication in the socially established manner expect, and have the right to expect, that the end of the process will be reached.[17]

Secondly, the concept serves to prevent harassment. The rationale of *res judicata* was urged three and one-half centuries ago in *Ferrer's* Case, VI Coke 7 (1599) in which Lord Coke urged the concept of *res judicata:*

> Otherwise, great oppression might be done under colour and pretence of law; for if there should not be an end of

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[17] As Mr. Justice Herrernan of the Wisconsin Supreme Court has indicated, the concept of res judicata is not limited to the courts. It is a principle which is found in all relationships. He recalled "the statement of Gen. Nathan Bedford Forrest, the semi-literate cavalry genius of the Confederate States of America, who, after twice refusing a private's request for furlough, scribbled on the back of the form, 'I told you twicest Godamnit know.'" 30 Wis. 2d 583; 141 N.W.2d 188, 193 (1966), Note 1, *id.* p. V-6, V-8.

> suits, then a rich and malicious man would infinitely vex him who hath right by suits and actions; and in the end (because he cannot come to an end) compel him (to redeem his charge and vexation) to leave and relinquish his right...[18]

Thirdly, the concept of *res judicata* is established in order to make efficient use of the courts. Without such steps, the courts would be overwhelmed by the mass of litigation. In fact, some courts seemingly have been overwhelmed with a concomitant breakdown in the administration of justice.[19]

Lastly, the doctrine of *res judicata* is important to the stature of the courts. Courts generally feel that they should respect the decision of other courts. This is found within states and is incorporated in our federal scheme by the full faith and credit concept of the federal constitution. But this is broader in scope than just the federal constitution; as the courts talk in terms of comity and respect, the decisions handed down by foreign courts.[20]

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[18] *id., p. V-9.*

[19] *id.*, p. V-10.

[20] *id.*, p. V-12.

Due process in the adjudicatory process involves the reasonableness of the court's procedure under the circumstances and not the nature of the action taken by the court. It is true, however, that due process to some extent controls the substantive law applied and the reasonableness of the action taken.[21]

In the case of *Hansberry v. Lee,* 311 U.S. 32, 85 L.Ed. 22, 61 S.Ct. 115 (1940), this Court has approached the problems created the juxtaposition of *res judicata* with due process in the following terms:

> [W]hen the judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res judicata* is challenged for want of due process it becomes the duty of this court to examine the course and procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunities to be heard as are requisite

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[21] *id.*, p. V-446.

to the due process which the constitution proscribes.[22]

The case currently before the Court addresses the opposite side of the coin by asking the Court to examine whether the failure to the state tribunal to apply the concept of *res judicata* to the judgment of the ejectment action so as to preclude a re-litigation of the same issues in the condemnation action constitutes a denial of due process to the litigant as the litigant has every expectation to be able to rely upon his judgment and that constitutional notions of due process will not permit another court or the same court in a subsequent proceeding to permit a re-litigation of the issues between the same parties. The protection of due process shelters all litigants in order to assure that they receive fair treatment under the circumstances.

IV. FAILURE TO APPLY THE DOCTRINE OF *RES JUDICATA* EQUALLY TO ALL DEFENDANTS CONSTITUTES A VIOLATION OF EQUAL PROTECTION OF THE LAW.

The Fourteenth Amendment to the Constitution provides in Section 1 that "no state shall...deny to any person within its jurisdiction the equal protection of the

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[22] *id.*, p. V-449. The juxtaposition of the concepts of due process and *res judicata* was revisited by this Honorable Court in the recent decision in *Ticor Title Ins. v. Brown*, _____ U.S. ____; 114 S.Ct. 1359; 128 L.Ed.2d 33 (1994).

laws." The constitutional limitation would have some application in the area of *res judicata* if a state should ever attempt to withhold *res judicata* effect from certain judgment according to the persons involved. This might well involve the classification of persons which would be unconstitutional under the equal protect clause. The state, of course, can make reasonable classifications based upon some rational criteria. See *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 55 L.Ed. 369, 31 S.Ct. 337 (1911). But there is a line beyond which the states cannot go.[23]

In the case before the Court, the ruling of the state court appears to clear the way for that class of defendant which is constituted of entities possessing the power of eminent domain to litigate and lose the title to the land in an ejectment action, then once the ejectment action is final, to file a condemnation action and seek to regain the improvements which it lost in the ejectment action without regard to the concept of *res judicata* which would apply to all other citizens in the state.

Obviously if Ms. Durden had trespassed onto the land of DeKalb County and built improvements during the pendency of a suit by the County to seek her ejectment, the principles which are set forth on pp 12-14 of this brief would have been used against her to cause her to lose those improvements with no claim for compensation. The fact that DeKalb County possesses

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[23] Vestal, *supra* at p. V-456.

the power of eminent domain by which it can quickly take the private property rights of citizens should be viewed as an aggravation of their unlawful actions instead of a mitigating circumstance as to why they should not be bound by the laws of improvements made by trespassers and the principle of *res judicata*. The decision of the state supreme court violates the equal protection mandate of the Fourteenth Amendment by creating this disparate treatment of the county as compared to "ordinary people".

CONCLUSION

The parties have litigated to a final conclusion the title of the entire 30-acre tract which ruling would apply to any improvements or fixtures placed thereon prior to the ruling. To permit DeKalb County to take this property from Ms. Durden without compensation does violence to the Fifth Amendment of the Constitution of the United States and the failure of the courts to observe the principle of *res judicata* violates the concepts of due process and equal protection of the laws. In order that this injury to these sacred rights is not sustained, this Court should grant the application for writ of certiorari.

Respectfully submitted,

E. Catherine Kimmel
Counsel of Record
4309 Bethesda Trail
Dunwoody, GA 30338
(404) 396-6764

James F. Stovall III
King, Taylor & Stovall, P.C.
P.O. Box 646
Tucker, GA 30085-0646
(404) 491-7200

Gary C. Harris
Gary C. Harris, P.A.
P.O. Box 1190
Clayton, GA 30525
(404) 945-6693

Attorneys for Petitioner

APPENDIX I - ORDER ON MOTION FOR A STAY OF REMITTITUR

S94A0056

SUPREME COURT OF GEORGIA

Atlanta MAR 23, 1994

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

BY: Sears-Collins, J.

The following direction was given:

LIZZIE DURDEN, ADMRX. v. DEKALB COUNTY, GEORGIA, et al.

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain review of this court's judgment rendered in this case on March 18, 1994, such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, provided that the

clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme Court of the United States, the clerk is directed to withhold the transmittal of such remittitur until the final disposition of the case by that court.

/S/Justice Leah J. Sears-Collins

APPENDIX II - ORDER ON MOTION FOR RECONSIDERATION

SUPREME COURT OF GEORGIA

Atlanta MARCH 18, 1994

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Case No. S94A0056

LIZZIE DURDEN, ADMRX. v. DEKALB COUNTY, GEORGIA, et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hunstein, J., disqualified.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court affixed the day and year last above written.
Sherie M. Welch, Clerk

APPENDIX III - OPINION AND JUDGMENT OF THE SUPREME COURT OF GEORGIA FILED FEBRUARY 28, 1994

In the Supreme Court of Georgia

Decided: Feb 28 1994

S93A1708. DURDEN V. REYNOLDS, et al.
S94A0056. DURDEN V. DEKALB COUNTY

SEARS-COLLINS, JUSTICE.

These appeals involve the proceeds of DeKalb County's condemnation of seven acres of property on which it constructed a garbage facility. At dispute in case number S93A1708 is the precondemnation ownership of the condemned property. We find that the trial court erred in refusing to grant partial summary judgment to Durden. At dispute in case number S94A0056 is whether the amount of the condemnation award should include the value of improvements to the property made by DeKalb County ("the County") before initiating condemnation proceedings. We find that the trial court properly granted partial summary judgment to the County on that issue.

1. In 1945, B.F. Anderson conveyed by deed 112 acres of land to Durden's parents, Jim and Mary Freeman, excepting a 30-acre tract of land from the transfer. In 1975, DeKalb County levied upon 30 acres of property to collect delinquent taxes for 1973 and 1974. The County notified George Anderson, a nephew of B.F. Anderson, of the levy, believing him to be the owner of the 30 acres because he had previously paid taxes on the property. In 1976, the County sold and purchased the 30 acres for $780, the amount of delinquent

taxes. In 1983, the DeKalb County Tax Commissioner filed an affidavit that seven years had passed since the date of the execution, that the property had not bee redeemed, and that title to the property had ripened by prescription in the County.

Mary Freeman became aware of the County's claim to the property when she was asked to sign a quitclaim deed by a party seeking to purchase the property from the County, and she filed a wrongful possession action in federal court in 1985. Mary Freeman died while that suit was pending, and the suit was dismissed by Durden, as administrator of Mary Freeman's estate. In January of 1987 Durden, on behalf of Mary Freeman's estate, filed an ejectment action against the County in superior court. In September of 1987, while the ejectment action was pending, the County began construction of a garbage facility on about 6.5 acres of the property. The County completed construction of the garbage facility in November 1989, and in January 1990 the trial court in the ejectment action found that, as the property was appraised at $1000 per acre at the time of the levy, the County's levying on the entire 30 acres to satisfy a $780 delinquency constituted an excessive levy, and ordered that Durden recover possession of the 30 acres and that a writ of possession issue in favor of Durden as against the County. This court affirmed the trial court's decision without opinion in October 1990, DeKalb County v. Durden, Case No. S90A0824.

In February 1991 the County filed a complaint for the condemnation of the seven acres upon which the garbage facility was situated. Because the heirs of B. F. Anderson (Reynolds, et al., hereinafter "Reynolds") also claimed title to the property subject to condemnation by virtue of certain language in the warranty deed from B. F. Anderson to the Freemans, the County named both Durden and Reynolds as defendants in the condemnation action and asked the court to

determine the ownership interests of these persons in the property and mold the final award accordingly.

The trial court appointed a special master, OCGA § 22-2-101 et seq., who, after conducting an evidentiary hearing, found that the estate of Mary Freeman had no ownership interest in the property being condemned, and awarded Reynolds $60,000 as the fair market value of the seven acres. The trial court entered judgment in accordance with the special master's award. Both Durden and Reynolds appealed to the superior court from the special master's award, OCGA § 22-2-112, and both Durden and the County Filed motions for partial summary judgment.

CASE NUMBER S93A1708.

2. The trial court denied Durden's motion for partial summary judgment on the issue of whether the 1945 warranty deed from B.F. Anderson to the Freemans clearly conveyed the condemned property. We granted Durden's application for interlocutory appeal to consider whether the deed is ambiguous so as to permit the admission of parol evidence, or whether the description of the portion to be excepted from the conveyance of the 62-acre tract is so vague that the exception from the conveyance fails."

The deed described the property conveyed to the Freemans, in relevant part, as follows:

> All that tract or parcel of land, lying and being in the sixteenth (16th) District of. originally Henry, now DeKalb County, Georgia, and being part of Lot of land number 156, the

same being fifty acres, more or less, out of the northeast corner of said land Lot, . . .

ALSO:

All that tract or parcel of land lying and being in the 16th District of originally Henry, now DeKalb County, Georgia and containing sixty-three acres, more or less, bounded as follows:

One acre, more or less in part of land lot 166 and sixty two acres more or less, in parts of land lots 156 and 165 . . . .

EXCEPT from the above 62 acre tract[24] 30 acres more or less situated in the Northwest corner of said tract, which tract is 800 feet more or less from the center of a branch on the south side and being all of said tract on the northwest side of the Center line of the above named branch. (Emphasis added.)

None of the parties disputes that the seven acres of property which the County now seeks to condemn lie within the 50-acre tract of land described above. However, Reynolds argues that because there is no "branch" within the 62-acre tract, there is no property to satisfy the deed's description of the property excepted, and parol evidence is, therefore, admissible to clarify the ambiguity created in the deed. Reynolds contends that parol evidence will show the jury that

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[24] The dissent fails to account for this first portion of the description of the exception.

the intent of the deed was to except from the conveyance a 30-acre tract within the 50-acre tract, including the condemned seven acres, thus entitling Reynolds to the proceeds of condemnation.[25]

"It is well established that where a property description in the written contract is ambiguous, in that it can be interpreted as referring to more than one piece of property, parol evidence is admissible to explain the ambiguity." Tuggle v. Wilson, 248 Ga. 335, 336 (282) SE2d 110) (1981) (emphasis supplied). However, parol evidence may not "add to, enlarge, or in any way change the description" contained in the deed. Gainesville Midland R.R. v. Tyner, 204 Ga. 535, 536 (50 SE2d 108) (1948) (emphasis supplied). Furthermore, "where subsequent words in a deed are of doubtful import, they cannot be construed so as to contradict the preceding words which are certain." 23 Am Jur Deeds § 227.

It is evident from the transcript of the hearing before the special master that the construction of the deed urged by Reynolds would require considerable resort to parol evidence. Under Reynolds' construction of the description of the exception to the conveyance, the actual 50-acre conveyance, which is sufficiently described in tne deed, would become inoperative. Therefore, such construction would substantially "change," not just explain, the description in the deed of the 50-acre conveyance, see Tyner, supra, and would "contradict the preceding [description of the 50-acre conveyance] which [is] certain," 23 Am Jur Deeds § 227, see also 2 G. Pindar Georgia Real Estate Law and Procedure § 19-153. Hence, we find that

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[25] We wish to note that this condemnation action initiated by the County does not incorporate a prayer for reformation of the deed.

parol evidence is not admissible to explain the deed's description of the excepted property. See Kennedy v. Kennedy, 183 Ga. 432, 440 (188 SE 722) (1936) ("when a deed by its terms admittedly conveys certain property, a part of the property may not be excluded from the deed on parol evidence that such was not the intent of the maker").

Having concluded that parol evidence should not be allowed to explain the description of the exception to the conveyance, the question remains as to what effect should be given to exception.

The special master concluded and the parties do not dispute that "[d]espite extensive testimony from three expert title examiners, familiar with DeKalb County property, there seems to be no way to precisely locate the . . . excluded 30-acre tract within the larger 113-acre tract described in the Warranty Deed." Where a grantor has excepted a portion of the land conveyed in his own favor, as in this case, "[t]he reserved portion of the land must be definitely identified, and the effect of vagueness in this respect will be to leave the conveyance operative on the entire tract." 2 G. Pindar, Georgia Real Estate Law and Procedure § 19-163 (4th Ed., 1993).

> A description of property excepted or reserved in a deed is sufficiently certain when the description is adequate to show what property is excepted or reserved from the operation of the deed. Where the description of the property excepted or reserved is so deficient that it cannot be located, the exception or reservation falls.

Clay v. Smith, 215 Ga. 668, 671 (112 SE2d 767) (1960); see also Nolan v. Cook, 231 Ga. 737 (204 SE2d 92) (1974).

As the description of the exception in this case is not sufficient to locate the property, and the admission of parol evidence to clarify the description would substantially change the definite description of the property conveyed, we find that the exception to the conveyance is void, "and being void, it could not make uncertain a description which was otherwise valid and complete." Clay, 215 Ga. at 671.

CASE NUMBER S94A0056.

3. Durden asserts that the trial court erred in granting the County's motion for partial summary judgment with respect to whether the amount of the condemnation award should include the value of the improvements. We find no error. The trial court concluded that

> [t]he evidence is undisputed that Condemnor was aware of Mrs. Durden's competing claim [to the property]. However, construction of improvements on the property by a condemnor with knowledge of a competing claim is not evidence of bad faith. [See OCGA § 44-11-9 (a).] In Searl v. School District No. 2, 133 U.S. 533 (1890), the Supreme Court of the United States held that where a trespasser which possessed the power of eminent domain erroneously believed that it held superior title to real property and erected improvements thereon, but was later forced to condemn the property, the value of the improvements would not be included in the compensation paid to the

> condemnees.... Any contrary ruling would require the condemnor to pay twice for the improvements which it constructed and would provide the condemnee a windfall. Condemnee Durden has offered no other evidence of bad faith on the part of the Condemnor, and there is no evidence whatsoever that Condemnor believed itself to be anything other than the rightful owner of the property until the decision in the ejectment action in January of 1990. Since notice of an outstanding or competing claim is not evidence of bad faith which would permit a condemnee to recover the value of improvements constructed by the condemnor and reap a windfall, Condemnor is entitled to judgment on its motion. [Cits.].

Had the County been a "naked trespasser" with no "shadow of right" to the property when it entered Durden's property and began construction, then it would be necessary for the County to pay Durden the value of the improvements in the subsequent condemnation. See Searl, 133 U.S. at 561-62. However, in this case DeKalb County's initial entry on the property was lawful, as it held a valid tax deed to the property at that time. Therefore, we find that the trial court correctly concluded that Durden is not entitled to the value of the improvements, even though the County knew of Durden's competing claim and its title was ultimately held to be invalid.

Case No. S94A0056: Judgment affirmed. All the Justices concur except Hunstein, J., who is disqualified.

Case No. S93A1708: Judgment reversed. All the Justices concur except Carley and Fletcher, JJ., who dissent, and Hunstein, J., who is disqualified.

[Dissent as to Case No. S93A1708, Durden v. Reynolds, et al. omitted.]

APPENDIX IV - ORDER GRANTING CONDEMNOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT IN THE SUPERIOR COURT OF DEKALB COUNTY, STATE OF GEORGIA, CIVIL ACTION FILE NO. 91-2600-4 FILED NOVEMBER 20, 1992

IN THE SUPERIOR COURT OF DEKALB COUNTY, STATE OF GEORGIA
DEKALB COUNTY, GEORGIA,

Condemnor,

vs.

CIVIL ACTION FILE NO. 91-2600-4

ALMA SCALES REYNOLDS, CHRISTINE SCALES SCOTT, D.L. CARTER, RUBY LEE RUCKER, GOLDEN LEE, LOIS ANDERSON THOMAS, WILLIE ANDERSON, VIVIEN ANDERSON SHERWOOD, BENNIE ANDERSON COLLINS, GLOVER ANDERSON, MARVIN ANDERSON, LIZZIE DURDEN, in her capacity as administratrix of the ESTATE OF MARY FREEMAN, deceased; GENE E. ADAMS, Tax Commissioner; and MARION GUESS, Probate Court,

Condemnees.

ORDER GRANTING CONDEMNOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Condemnor's Motion for Summary Judgment having come before the Court on September 10, 1992, all parties being present or represented by counsel, and the Court having heard the argument of counsel and considered the authority submitted in the briefs for both parties, does hereby find as follows:

1.

This is a condemnation action pursuant to which Condemnor has condemned seven (7) acres of real property along with certain drainage easements adjacent thereto located in DeKalb County, Georgia. A copy of the legal description is attached hereto as Exhibit A, and the condemned property is hereinafter referred to as (the "Property").

2.

Prior to the filing of this condemnation, Condemnor built a garbage collection facility on the Property at a cost to Condemnor of approximately $700,000. Condemnor brought this Motion for Partial Summary Judgment contending that the value of the improvements that it constructed on the Property should not be included as part of any award of just and adequate compensation to the condemnees. In granting Condemnor's Motion, the Court finds that there is no genuine issue of material fact as to the following:

FINDINGS OF FACT

3.

The Property is a part of a thirty (30) acre tract of land which was sold and purchased by Condemnor for unpaid property taxes on January 6, 1976. Said thirty (30) acre tract of land is hereinafter referred to as the "30 acre tract." Following the tax sale, the 30 acre tract was not redeemed during the statutory period, and on February 22, 1983 the Tax Commissioner for Condemnor filed an Affidavit declaring that Condemnor's title to the 30 acre tract had ripened by prescription.

4.

In the spring of 1984, Condemnor was first notified by counsel for Mrs. Mary Freeman that she claimed title to the 30 acre tract under a 1945 deed from a Dr. B.F. Anderson. Condemnor examined Mrs. Freeman's claim to the 30 acre tract, and responded to her in writing asserting that her claim to the 30 acre tract was without basis.

5.

In July of 1985, Mrs. Freeman filed suit in the United States District Court for the Northern District of Georgia, civil action file #C85-3502A, seeking to recover possession of the 30 acre tract and damages. Mrs. Freeman died during the course of the lawsuit, and her daughter, Lizzie Durden, was named administratrix of her Estate. Acting on behalf of Mrs. Freeman's Estate, Ms. Durden dismissed the suit in the District Court. The claim for damages was dismissed with prejudice. The claim for recovery of the property was dismissed without prejudice.

6.

In January of 1987, Ms. Lizzie Durden, acting as administratrix for Mrs. Freeman's estate, filed a second suit, an ejectment action against Condemnor in DeKalb County Superior County, civil action file #87-1136-3. The basis for the ejectment action was the Condemnor's sale of the 30 acre tract for unpaid taxes was an excessive levy and therefore void. Condemnor defended the ejectment action on the grounds that the sale of the 30 acre tract was not an excessive levy because it paid the maximum amount allowed by OCGA § 48-4-20, and that the tax deed had ripened into title by prescription.

7.

While the ejectment action was pending, Condemnor began construction of the garbage facility in September of 1987. Mrs. Durden was aware of the construction but took no action to prevent or delay such construction. Construction of the garbage collection facility was complected in November of 1989.

8.

On January 31, 1990, the Court granted Durden's Motion for Summary Judgment in the ejectment action, holding that the tax sale of the 30 acre tract was void as an excessive levy. That decision was affirmed by the Georgia Supreme Court without opinion on October 15, 1990.

9.

Condemnor filed this condemnation action on February 14, 1991, seeking to condemn only that portion of the 30 acre

tract which is necessary for the operation of the garbage collection facility.

CONCLUSIONS OF LAW

10.

Condemnee Lizzie Durden contends that Condemnor's decision to begin construction of the garbage collection facility during the pendency of the ejectment action amounts to bad faith such that she is entitled to recover as a part of any award of just and adequate compensation for the property, the value of the improvements which the Condemnor constructed. The Court does not agree. The evidence is undisputed that Condemnor was aware of Mrs. Durden's competing claim. However, construction of improvements on property by a condemnor with knowledge of a competing claim is not evidence of bad faith. In Searl v. School District No. 2, 133 U.S. 533 (1890), the Supreme Court of the United States held that where a trespasser which possessed the power of eminent domain erroneously believed that it held superior title to real property and erected improvements thereon, but was later forced to condemn the property, the value of the improvements would not be included in the compensation paid to the condemnees. Any contrary ruling would require the condemnor to pay twice for the improvements which it constructed and would provide the condemnee a windfall. Condemnee Durden has offered no other evidence of bad faith on the part of Condemnor, and there is no evidence whatsoever that Condemnor believe itself to be anything other than the rightful owner of the property until the decision in the ejectment action in January of 1990. Since notice of an outstanding or competing claim is not evidence of bad faith which would permit a condemnee to recover the value of improvements constructed by the condemnor and reap a

windfall, Condemnor is entitled to judgment on its motion. Searl v. School Dist. No. 2, 133 U.S. 533 (1890); Young v. McKenzie, 3 Ga. 31 (1847); Charleston & W. Carolina Ry. Co. v. Hughes, 105 Ga. 1, 30 S.E. 972 (19898); Harper v. Durden, 177 Ga. 216, 70 S.E. 45 (1933); Zugar v. Tennessee A & G Ry., 65 Ga. App. 658, 16 S.E.2d 149 (1941). This decision is also supported by the holdings in cases from other jurisdictions, e.g., Anderson-Tully Co. v. United States, 189 F.2d 192 (5th Cir. 1951), cert. denied, 342 U.S. 826 (1951); Alaska v. 13.90 Acres of Land, 625 F. Supp. 1315 (D. Alaska 1985) aff'd sub nom. Etalook v. Exxon Pipeline Co., 831 F.2d 1440 (9th Cir. 1987); Berry v. United Gas Pipe Line Co., 370 So.2d 235 (1979)

11.

Furthermore, Ms. Durden was aware that Condemnor was constructing the garbage collection facility but chose to take no action in an effort to either prevent or delay such construction apparently in the hope that it would increase the damages which she might recover. One who stands by and allows improvements for the public good to be erected on his property cannot recover the value of the improvements. Charleston & W. Carolina Ry. Co. v. Hughes, 105 Ga. 1, 30 S.E. 972 (1898). Therefore, Condemnor is entitled to partial summary judgment for this reason as well.

12.

On a motion for summary judgment the movant must demonstrate that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law. Lampkin v. Edwards, 222 Ga. 288, 149 S.E.2d 708 (1966). Condemnor has met the burden in this case. There is no evidence from which it could be determined that Condemnor acted in bad faith in initiating construction of the garbage

facility. Furthermore, Condemnee Durden acquiesced in such construction that she would not be entitled to recover the value of improvements.

Accordingly, Condemnor's Motion for Partial Summary Judgment is GRANTED.

IT IS HEREBY ORDERED, this 20th day of Nov., 1992.

/S/Carol W. Hunstein,
Judge
DeKalb Superior Court

PREPARED BY:
JOHNSON & MONTGOMERY
/S/Harmon W. Caldwell, Jr.
Attorney for Condemnor

2900 Chamblee-Tucker Road
Building Nine
Atlanta, Georgia 30341
(404) 458-2888

EXHIBIT "A"

TRACT I

All that tract of parcel of land lying in and being in Land Lot 156 of the 16th District of DeKalb County, Georgia, and more particularly described as follows:

[LENGTHY METES AND BOUNDS
LEGAL DESCRIPTION OMITTED FROM
THIS APPENDIX]

* * *

TRACT II

All that tract of parcel of land lying in and being in Land Lot 156 of the 16th District of DeKalb County, Georgia, and more particularly described as follows:

[LENGTHY METES AND BOUNDS
LEGAL DESCRIPTION OMITTED FROM
THIS APPENDIX]

TRACT 3 - PERMANENT DRAINAGE EASEMENT

All that tract of parcel of land lying in and being in Land Lot 156 of the 16th District of DeKalb County, Georgia, and more particularly described as follows:

[LENGTHY METES AND BOUNDS
LEGAL DESCRIPTION OMITTED FROM
THIS APPENDIX]

TRACT 4 - PERMANENT DRAINAGE EASEMENT

All that tract of parcel of land lying in and being in Land Lot 156 of the 16th District of DeKalb County, Georgia, and more particularly described as follows:

[LENGTHY METES AND BOUNDS
LEGAL DESCRIPTION OMITTED FROM
THIS APPENDIX]

APPENDIX V - EXCERPTS OF BRIEF FILED IN THE SUPREME COURT OF GEORGIA BY LIZZIE DURDEN, ADMINISTRATOR OF THE ESTATE OF MARY FREEMAN, APPELLANT

IN THE COURT OF APPEALS

STATE OF GEORGIA

LIZZIE DURDEN, ADMINISTRATOR OF THE ESTATE OF MARY FREEMAN,
APPELLANT

versus

DEKALB COUNTY, GEORGIA, APPELLEE

CASE NO. A93A1780

BRIEF AND ENUMERATION OF ERRORS

OF APPELLANT

James F. Stovall III
Attorney for Appellant
State Bar Number 685950
Post Office Box 646
Tucker, Georgia 30085-0646

(404) 491-7200

IN THE COURT OF APPEALS

STATE OF GEORGIA

LIZZIE DURDEN, ADMINISTRATOR OF THE ESTATE OF MARY FREEMAN,	)
Appellant,	)
v.	)CASE) NO.
	)A93A1780
DEKALB COUNTY, GEORGIA,	)
Appellee,	)

BRIEF OF APPELLANT

***

1. Suit in ejectment resolved the issue of ownership of improvement.

Lizzie Durden filed her previous suit in ejectment in January of 1987. At that time the land was open and unoccupied. In late September, the county moved onto the land and began clearing and grading. In December 1987 the court denied the county's motion for summary judgment. The

county then hired Carl Chrisope to research the title and his report in February of 1988 concluded that the title was in the heirs of B.F. Anderson, Lizzie Durden's grantor. Despite the fact that Lizzie Durden was then suing in ejectment and the county had a report from its own expert stating that title to the land was in the heirs of Anderson, the county eschewed its right to file a condemnation action and proceeded to erect buildings and other improvements on the land.

After the buildings were substantially complete the court granted summary judgment to Lizzie Durden in her suit in ejectment and provided for a writ of possession. This summary judgment was affirmed on appeal. It is Lizzie Durden's position that the improvements became her property. A judgment in ejectment concludes all matters in issue and all matters which might have been put in issue. Pindar, Ga. Real Est. Law §23-128 (3rd ed.) citing O.C.G.A. §9-12-40. The fact that Lizzie Durden received a final judgment and writ of possession on her ejectment suit after the improvements were placed on her land distinguishes this case from the condemnation cases relied upon by the trial court.

The court cited Searl v. School District No. 2, 133 U.S. 533 (1890); Young v. McKenzie, 3 Ga 31 (1847); and Charleston and West Carolina Railway Company v. Hughes, 105 Ga 1, 30 S.E. 972 (1898) in its opinion. All three of these cases have a common factual basis which can be distinguished from the present case.

In Searl, Young and Charleston Railway, the entity with the right of eminent domain took possession of the land after having acquired what it was assured was good title to the land. In Searl, the school district bought the land and paid more than fair market value after having engaged "reputable attorneys" to

investigate the title and report that the school district should disregard Searl's competing title. In Young, the bridge company went through proceedings to acquire its land by eminent domain. Subsequently, it was learned that due to a clerical error in the clerk's office a paper was filed in the wrong docket which apparently rendered the proceedings void. In Charleston Railway, the railway was assured it had acquired a fee simple interest in the land when in fact its grantor was only possessed of a life estate.

Contrast these facts with the facts of the present case where the county purported to acquire a $30,000.00 tract for the price of $780.00. The name of the defendant in fi.fa. did not appear in the chain of title.

In the Young and Charleston Railway cases cited by the trial court, the entity with the power of eminent domain proceeded to make improvements to the land without notice of the claims and it was not until long after the improvements were made that the claimants filed suits in ejectment. In Searl the claimant or his predecessor in title did write letters to the school board informing them of their claim, but did not file a suit in ejectment until after the school building had been erected.

In this case, Lizzie Durden filed her suit in ejectment on January 8, 1987. While the suit was pending the county entered the previously vacant property in late September, 1987 and began clearing.

Lastly, in Searl, Young and Charleston Railway, as soon as the claimant filed suit in ejectment, the condemning entity sought and received an order from the court enjoining the prosecution of the ejectment action until the defendant-in-ejectment could institute an action for eminent domain to

acquire the interest of the plaintiff-in-ejectment. In not one of these cases did the authority with the power of eminent domain permit the ejectment action to go to final judgment as the county did here.

If the judgment in the ejectment action did not resolve all issues as to title to the disputed land, what was the purpose of that action? There is not one case in this state or in this country that permits the county to sit back and litigate the ejectment case, lose the case, and then condemn the property and pay only for the value of the land.

As an aside, it should be noted that O.C.G.A. § 44-11-9 permits relief to a defendant-in-ejectment who has made valuable improvements to the land on which he is trespassing. If the improvements were made in good faith he is entitled to set off the value of the improvements in full, if the improvements were not made in good faith he is entitled to set off the improvements only to the extent of the mesne profits [rents] to which the plaintiff is entitled. In this case, the plaintiff did not make a claim for mesne profits and the county did not invoke a defense of set-off.

* * *

7. The county is under a constitutional mandate not to take private property for a public purpose without first having paid just and adequate compensation GA CONST. 1983, Article I, § III, ¶1; O.C.G.A. §22-1-5 and §22-1-6.

* * *

APPENDIX VI - CONDEMNEE LIZZIE DURDEN'S BRIEF IN OPPOSITION TO CONDEMNOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT

IN THE SUPERIOR COURT OF DEKALB COUNTY, STATE OF GEORGIA

DEKALB COUNTY, GEORGIA,	*
	*
Condemnor,	*
	*
v.	* Civil
	* Action
	*
ALMA SCALES REYNOLDS,	* File No.
	* 91-
CHRISTINE SCALES SCOTT, D. L.	* 2600-3
CARTER, RUBY LEE RUCKER,	*
GOLDEN LEE, LOIS ANDERSON	*
THOMAS, WILLIE ANDERSON,	*
VIVIEN ANDERSON SHERWOOD,	*
BENNIE ANDERSON COLLINS,	*
GLOVER ANDERSON, MARVIN	*
ANDERSON, LIZZIE DURDEN,	*
in her capacity as	*
administratrix of the ESTATE	*
OF MARY FREEMAN, deceased;	*
GENE E. ADAMS, Tax	*
Commissioner; and MARION	*
GUESS, Judge, Probate Court,	*
	*
Condemnees.	*

CONDEMNEE LIZZIE DURDEN'S BRIEF IN OPPOSITION TO CONDEMNOR'S MOTION FOR

PARTIAL SUMMARY JUDGMENT

* * *

Condemnee Durden asks the Court to take into consideration the following general principles when reviewing this case:

> The Georgia Constitution provides that "private property" shall not be taken or damaged for public purposes, without just and adequate compensation being first paid... Georgia Constitution 1983, Art. I, § III, Paragraph 1; O.C.G.A. §§ 22-1-5 and 22-1-6. (Emphasis supplied.)

The general rule is that the condemning authority must pay the owner of property whose land has been taken for a public purpose, the "value of the property taken."

* * *

The County's actions in moving onto the land were in violation of the Constitutional mandate that no private property be taken or injured for public purposes without just and adequate compensation having first been paid. The County knew that its tax deed was worthless, it knew of the Freeman family's claim by virtue of the lawsuit, and it now states that it was of the opinion that the property really belongs to the heirs of Anderson. Instead of seeking an order in 1987 to enjoin the lawsuit filed by Durden while it filed a condemnation action naming all potential claimants (as it has claimed to have done here), the County chose to move onto the property as a mere trespasser and to treat the land as its own.

* * *

Here the County was aware of the claim of Durden, it was aware of the facts upon which its tax deed was declared void, and presumably it was aware of the facts upon which it now asserts the title to the Subject Property to be in the heirs of Anderson. Instead of filing a condemnation action to legitimize its claim and abide by the constitutional mandate of first paying just and adequate compensation, it chose to ignore the claims of the Condemnees and move on the property and litigate the ejectment with Ms. Durden; there is no basis for this course of action other than bad faith.

* * *

If this Court rules that the County's sole obligation is to pay just and adequate compensation for the land alone and not the improvements, this would encourage corporations with the power of eminent domain to ignore the Constitutional rights of the citizens of this state by proceeding to take their property for public use without bothering to institute condemnation proceedings. If the private landowner should object, then the condemning authority merely has to pay the value of the land, which it would have had to have paid if it had initially filed for condemnation. In order to protect the Constitutional rights of private landowners against those corporations with the power of eminent domain, this Court should apply the rule laid down in Perley v. Cambridge, 220 Mass. 507, 108 N.E. 494, where the court said:

> We are able to perceive no sound reason why this well established rule should not apply in instances where a municipality enters without shadow of right and as a pure trespasser upon the land of another and without consent of

the owner affixes thereto structures which in their nature become part of the realty. A municipality enjoys no special immunity in this respect not accorded in general to others. It commonly possesses the power to exercise eminent domain and thus take the property of the landowner against his will. This factor affords it the less excuse for invading tortiously rights which it may extinguish in a legal manner.

APPENDIX VII - CONDEMNEE LIZZIE DURDEN'S POST HEARING BRIEF TO SPECIAL MASTER

IN THE SUPERIOR COURT OF DEKALB COUNTY, STATE OF GEORGIA

DEKALB COUNTY, GEORGIA,	*
	*
Condemnor,	*
	*
v.	* Civil
	* Action
	*
ALMA SCALES REYNOLDS, CHRISTINE SCALES SCOTT, D. L. CARTER, RUBY LEE RUCKER, GOLDEN LEE, LOIS ANDERSON THOMAS, WILLIE ANDERSON, VIVIEN ANDERSON SHERWOOD, BENNIE ANDERSON COLLINS, GLOVER ANDERSON, MARVIN ANDERSON, LIZZIE DURDEN, in her capacity as administratrix of the ESTATE OF MARY FREEMAN, deceased; GENE E. ADAMS, Tax Commissioner; and MARION GUESS, Judge, Probate Court,	* File No. *91-2600-3 * * * * * * * * * * * * * * * * * *
Condemnees.	*

POST HEARING BRIEF TO SPECIAL MASTER

* * *

The County in its prior brief then suggests that Ms. Durden had some duty to take further action to enjoin the County's wrongful acts in moving onto subject property. This argument has no validity in that: 1) there is no assurance that such an injunction would have been granted, and 2) the granting of such an injunction would have exposed Ms. Durden and the Estate of Mary Freeman to personal liability in the event that the ejectment action had been decided adversely to her. It is quite clear that the County's "safe harbor" in this matter would have been to have filed its condemnation action in September of 1987, at the time it wanted to move onto the land, naming all claimants to the title as condemnees and alleging that the County at that time also claimed to own the property. This would have been in keeping with the constitutional mandate that no private property be taken for public use except when the owner has first been paid just and adequate compensation.

* * *

APPENDIX VIII - CONDEMNEE LIZZIE DURDEN'S TRIAL MEMORANDUM SPECIAL MASTER PROCEEDINGS

IN THE SUPERIOR COURT OF DEKALB COUNTY, STATE OF GEORGIA

DEKALB COUNTY, GEORGIA,	*
	*
Condemnor,	*
	*
v.	* Civil
	* Action
	*
ALMA SCALES REYNOLDS, CHRISTINE SCALES SCOTT, D. L. CARTER, RUBY LEE RUCKER, GOLDEN LEE, LOIS ANDERSON THOMAS, WILLIE ANDERSON, VIVIEN ANDERSON SHERWOOD, BENNIE ANDERSON COLLINS, GLOVER ANDERSON, MARVIN ANDERSON, LIZZIE DURDEN, in her capacity as administratrix of the ESTATE OF MARY FREEMAN, deceased; GENE E. ADAMS, Tax Commissioner; and MARION GUESS, Judge, Probate Court,	* File No. * 912600-3 * * *

N. The County has acted in bad faith and in derogation of the Constitutional rights of Condemnee Durden by taking the Subject Property without having first paid just and adequate compensation for the same.

* * *

Condemnee Durden asks the Special Master to take into consideration the following general principles when reviewing this case:

> The Georgia Constitution provides that "private property" shall not be taken or damaged for public purposes, without just and adequate compensation being first paid... Georgia Constitution 1982, Art. I, § III, Paragraph 1; O.C.G.A. §§ 22-1-5 and 22-1-6. (Emphasis supplied.)

The general rule is that the condemning authority must pay the owner of property whose land has been taken for a public purpose, the "value of the property taken."

* * *

The County's actions in moving onto the land were in violation of the Constitutional mandate that no private property be taken or injured for public purposes without just and adequate compensation having first been paid. The County

knew that its tax deed was worthless, it knew of the Freeman family's claim by virtue of the lawsuit, and it now states that it was of the opinion that the property really belongs to the heirs of Anderson. Instead of seeking an order in 1987 to enjoin the lawsuit filed by Durden while it filed a condemnation action naming all potential claimants (as it has claimed to have done here), the County chose to move onto the property as a mere trespasser and to treat the land as its own.

* * *

Here the County was aware of the claim of Durden, it was aware of the facts upon which its tax deed was declared void, and presumably it was aware of the facts upon which it now asserts the title to the Subject Property to be in the heirs of Anderson. Instead of filing a condemnation action to legitimize its claim and abide by the constitutional mandate of first paying just and adequate compensation, it chose to ignore the claims of the Condemnees and move on the property and litigate the ejectment with Ms. Durden; there is no basis for this course of action other than bad faith.

* * *

If this Court rules that the County's sole obligation is to pay just and adequate compensation for the land alone and not the improvements, this would encourage corporations with the power of eminent domain to ignore the Constitutional rights of the citizens of this state by proceeding to take their property for public use without bothering to institute condemnation proceedings. If the private landowner should object, then the condemning authority merely has to pay the value of the land, which it would have had to have paid if it had initially filed for condemnation. In order to protect the Constitutional rights of private landowners against those corporations with the power of eminent domain, this Court should apply the rule laid down in Perley v. Cambridge, 220 Mass. 507, 108 N.E. 494, where the court said:

We are able to perceive no sound reason why this well established rule should not apply in instances where a municipality enters without shadow of right and as a pure trespasser upon the land of another and without consent of the owner affixes thereto structures which in their nature become part of the realty. A municipality enjoys no special immunity in this respect not accorded in general to others. It commonly possesses the power to exercise eminent domain and thus take the property of the landowner against his will. This factor affords it the less excuse for invading tortiously rights which it may extinguish in a legal manner.

* * *

APPENDIX IX - LETTER FROM CONDEMNEE LIZZIE DURDEN TO HONORABLE CAROL W. HUNSTEIN, JUDGE, DEKALB SUPERIOR COURT DATED OCTOBER 7, 1992

Honorable Carol W. Hunstein
Judge, DeKalb Superior Court
DeKalb County Courthouse
556 North McDonough Street
Decatur, GA 30030 VIA HAND DELIVERY

Re: DeKalb County v. Reynolds, et al.
Civil Action File No. 91C-2600

Dear Judge Hunstein:

I am in receipt of DeKalb County's proposed Order granting its Motion for Partial Summary Judgment. Your office has informed me that you intend to grant this Motion, but have extended me ten (10) days to provide my comments or objections regarding the form of the Order. As you can imagine, my clients and I respectfully disagree with your ruling in the case. Although we have no specific objection as to the form, we would ask you to consider the following points.

* * *

Finding of Fact No. 8:

Comment: It should be added: "A Writ of Possession was issued in favor of Mrs. Durden by DeKalb Superior Court on November 8, 1990.

APPENDIX X - DISTINGUISHING FACTS BETWEEN SEARL V. SCHOOL DISTRICT NO. 2, 133 U.S. 553 AND THE INSTANT CASE

Searl	Durden
Searl stipulated that the school district erected the building in reliance upon such belief that it had the better title.	Durden does not concede that the county built the improvements in reliance that it had the better title.
Set out to acquire land for a school site.	Decided to use a parcel it carried in its inventory for a public works site.
Took title by deed of bargain and sale from persons in possession of property from persons holding under "squatter's title".	Did not have title run until almost a year after litigation was commenced and two months after entering and starting clearing on the land. The attorney reported to the county that the title was in the heirs of B.F. Anderson, not in the county or Durden.
Paid more than full value to the person from whom they purchased title.	Paid $780.00 for a 30-acre parcel that was carried on the tax digest at $30,000.00+.
When claimant filed a suit in ejectment, the school	board enjoined the ejectment action in order to

file an action to condemn the claimant's interest.

When Durden filed her suit in ejectment the county did nothing for nine months. Then it went on the land to commence clearing and it filed a motion for summary judgment. The county did not put in a claim for value of its

44-11-9(a) but instead litigated the issue of ownership to a final judgment. When the Supreme Court affirmed the judgment of the trial court which granted a writ of possession to Durden, did it not intend to award the land and everything attached thereon to Lizzie Durden? If the roles were reversed and Lizzie Durden had made improvements to the county's land during the pendency of an ejectment action, she would have lost them under the doctrine announced in Harper v. Durden, 177 Ga. 216, 224 (1933); Zugar v. Tn.A&G. Ry. Co., 65 Ga. App. 658 (1941).

APPENDIX XI - ALL PARTIES TO THE INSTANT CASE NOT A PARTY TO THE PETITION FOR WRIT OF CERTIORARI

ALMA SCALES REYNOLDS, CHRISTINE SCALES SCOTT, D.L. CARTER, RUBY LEE RUCKER, GOLDEN LEE, LOIS ANDERSON THOMAS, WILLIE ANDERSON, VIVIEN ANDERSON SHERWOOD, BENNIE ANDERSON COLLINS, GLOVER ANDERSON, MARVIN ANDERSON, GENE E. ADAMS, Tax Commissioner; and MARION GUESS, Probate Court.

Supreme Court, U.S.
FILED
SEP 9 1994
OFFICE OF THE CLERK

(2)

No. 93-2030

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LIZZIE DURDEN, in her capacity as Administratrix of the Estate of Mary Freeman, deceased,

Petitioner,

v.

DeKALB COUNTY, GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT H. WALLING
(Counsel of Record)
Suite 953, Wachovia Building
315 West Ponce de Leon Avenue
Decatur, Georgia 30030
(404) 377-2520

JONATHAN A. WEINTRAUB
Fifth Floor
Maloof Center
1300 Commerce Drive
Decatur, Georgia 30030
(404) 371-3011

Attorneys for Respondent, DeKalb County, Georgia.

September 9, 1994

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21 pp

QUESTION PRESENTED

Whether just compensation includes the value of improvements made by a local government entity before filing of condemnation proceedings?

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v.

DeKALB COUNTY, GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The historical context in which DeKalb County acquired the tax deed to the 30-acre tract began in 1945. In that year B.F. Anderson conveyed a larger tract of unimproved property to Jim and Mary Freeman. Mr. Anderson purported to except from the conveyance a 30-acre tract. Almost fifty years later, the ownership

of the 30-acre tract became a matter of dispute in this condemnation litigation with the heirs of B.F. Anderson (the "Reynolds family") and Mary Freeman (and later her heirs represented by Petitioner Durden) asserting competing claims of ownership.

The ownership dispute was resolved earlier this year in favor of Petitioner Durden and against the Reynolds family by a ruling of the Supreme Court of Georgia that the description of the excepted 30-acre tract was so vague as to be void. That ruling was accepted by the Reynolds family as final and is not before this Court. (Opinion of Supreme Court of Georgia – Appendix III to Petition for Certiorari, p. 10a.)

The petition for certiorari involves only seven (7) acres of the 30-acre tract and presents the question whether a condemnation award to Petitioner Durden, should include the value of a garbage collection facility constructed by DeKalb County on the 7-acre tract before initiation of a condemnation proceeding in 1991. The Supreme Court of Georgia decided that question in favor of DeKalb County. Petitioner Durden seeks review of that decision by this Court.

ACQUISITION OF TAX DEED BY DeKALB COUNTY

From 1959 to 1972 property taxes on the 30-acre tract were paid by George Anderson, a nephew of B.F. Anderson. Apparently he believed that tract to be the 30-acre tract excepted by his uncle in the 1945 conveyance to Jim and Mary Freeman. However, neither he nor anyone else paid the taxes in 1973 or 1974, so the County initiated a tax sale. The County sent George Anderson notice of the tax sale, believing him to be the owner of the 30-acre tract because he had paid the taxes from 1959 to 1972.

The tax sale took place in 1976. There being no other bidder, the County purchased the 30-acre tract for $780.49, the amount of the delinquent taxes then due and payable.[1] Following a tax sale, the owner may reacquire title by "redeeming" the property from the tax sale by paying a redemption price to the successful bidder within twelve months after the tax sale.[2] No one redeemed the property during the redemption period following the tax sale and, consequently, the defeasible title of DeKalb County became absolute. Although the County did not do so, under Georgia law it could have conveyed good title of the 30-acre tract to a third party after its defeasible title became absolute. *Durham v. Crawford,* 196 Ga. 381, 26 S.E.2d 778 (1943).

PETITIONER DURDEN'S EJECTMENT ACTION

Mary Freeman became aware of the tax deed in 1984 when she was asked to sign a quitclaim deed by a party seeking to purchase the property from the County. She then contacted the County, contending that the 1976 tax sale to the County was void and that she owned the 30-acre tract. On the basis of an independent title examination, the County concluded that the owners of the 30-acre tract at the time of the tax sale had been the heirs of B.F. Anderson (i.e., the Reynolds family) and, therefore, Mary Freeman had no standing to object to the tax sale.

---

[1] Under Georgia law a county may purchase real property offered for sale by virtue of tax executions. However, a county may bid only when other bids do not cover the amount of the tax execution and its bid may not exceed the amount of the tax execution and costs. See O.C.G.A. §48-4-20.

[2] The redemption price is the amount paid for the property at the tax sale plus an annual premium of a certain percentage and costs. O.C.G.A. §48-4-42.

Mary Freeman then filed a wrongful possession action in Federal court in 1985. She died while that suit was pending, and the suit was dismissed by Petitioner Durden, named successor plaintiff as administrator of her mother's estate.

In January of 1987 Petitioner Durden, on behalf of Mary Freeman's estate, filed an ejectment action naming only the County as defendant. The Reynolds family was not named a defendant although Petitioner had knowledge of their competing claim to ownership of the 30-acre tract.

In September of 1987, while the ejectment action was still pending in the trial court, the County began construction of the garbage collection facility on about seven (7) acres of the 30-acre tract and completed construction in November 1989. In January 1990 the trial court held the County's tax deed void, on the ground of excessive levy, and entered an order granting possession of the 30-acre tract to Petitioner Durden. The Supreme Court of Georgia affirmed the trial court's decision without opinion. Although Petitioner Durden had sought a judgment for title in the ejectment action, the trial court made no ruling on that issue (See Appendix I, p. 1a).

DeKALB COUNTY'S CONDEMNATION ACTION

In February 1991 the County filed a compaint for the condemnation of the 7-acre tract upon which the garbage facility was located (making no claim to the remainder of the 30-acre tract). Since the Reynolds family also claimed ownership to the property, the County named both Petitioner Durden and the Reynolds family as condemnees and asked the court to resolve the ownership dispute.

The trial court denied condemnee Durden's motion for summary judgment as to the ownership dispute with the Reynolds family and granted the County's motion for partial summary judgment, holding that she was not entitled to the value of improvements placed upon the 7-acre tract by the County (Order Granting Condemnor's Motion for Partial Summary Judgment – Appendix to Petition for Certiorari, p. 12a).

Condemnee Durden appealed both orders, one to the Supreme Court of Georgia and the other to the Court of Appeals of Georgia. Both appeals were consolidated with the Supreme Court of Georgia on February 28, 1994, reversing the trial court on its denial of condemnee Durden's motion for summary judgment as to the ownership question and affirming the trial court on its grant of the County's motion for partial summary judgment as to the value question. (Opinion and Judgment of the Supreme Court of Georgia – Appendix III to the Petition for Certiorari, p. 4a.)

SUMMARY OF THE ARGUMENT

This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. Contrary to the claim of Petitioner, neither the decision of the trial court nor the decision of the Supreme Court of Georgia conflict with decisions of this Court regarding the question of whether just compensation includes the value of improvements made before filing of condemnation proceedings by a local governmental entity. Rather Petitioner merely challenges the application of a well-established decision of this Court to the particular facts of this case.

ARGUMENTS & AUTHORITIES

I.
REASONS FOR DENIAL OF WRIT OF CERTIORARI.

This case presents no novel question of law. It is a dispute about whether just compensation includes the value of improvements made by a local governmental entity. The decisions of the trial court and the Supreme Court of Georgia involved no important question of federal law which has not been, but should be, settled by this Court, nor did it decide a federal question in a way that conflicts with applicable decisions of this Court.

Contrary to the contention of Petitioner, there are no constitutional questions. Petitioner's claims of violation of rights to equal protection and due process are based on the erroneous assumption that the facts of this case required the Georgia courts to apply issue preclusion in a condemnation action following judgment in an ejectment action. Since there is no basis for issue preclusion, there is no basis for Petitioner's constitutional claims.

II.
JUST COMPENSATION DID NOT INCLUDE THE VALUE OF THE IMPROVEMENTS CONSTRUCTED ON THE PROPERTY BEFORE FILING OF THE CONDEMNATION ACTION.

Petitioner Durden contends that construction of the garbage collection facility on the 7-acre tract before condemnation with knowledge of her claim of ownership, amounted to bad faith by DeKalb County and, for that reason, the condemnation award should have included the value of the improvements. However, this Court long ago held otherwise. Construction of improvements on property by a condemnor, before condemnation takes place, with knowledge of a competing claim is not evidence of

bad faith. *Searl v. School District No. 2,* 133 U.S. 553, 10 S.Ct. 374, 33 L.Ed. 740 (1890).

In *Searl,* a school district, which had the power of eminent domain, erected a new school building on property, erroneously believing it owned the property. Later the school district had to condemn the property. The Court concluded that "the value of the improvements could not justly be included in the compensation." In so doing the Court held

> The [trial court] was not dealing with an action of ejectment or trespass, but simply with a proceeding in the exercise of the right of emiment domain. That right is the offspring of political necessity, and is inseparable from sovereignty unless denied to it by its fundamental law. It cannot be exercised except upon condition that just compensation shall be made to the owner, and it is the duty of the State, in the conduct of the inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it. [Cits.]. The occupancy here was in no respect for a private purpose or pecuniary gain, but strictly and wholly for the public use. There could be no presumption that this public agent intended to confer public property upon a private individual nor were the circumstances such as to impart the character of willful trespass to the entry by the district. . . . 133 U.S. at 562.

This Court went on to describe good faith as "a freedom from a design to defraud the person having the better title" and to state that knowledge of an adverse claim or lien does not indicate bad faith in a purchaser "unless accompanied by some improper means to defeat such claim or lien." 133 U.S. at 564.

The Supreme Court of Georgia, in affirming the trial court's ruling in favor of the County excluding the value of the garbage facility, based its decision squarely on *Searl*, holding

> Had the County been a "naked trespasser" with no "shadow of right" to the property when it entered Durden's property and began construction, then it would be necessary for the County to pay Durden the value of the improvements in the subsequent condemnation. See *Searl*, 133 U.S. at 561-62. However, in this case DeKalb County's initial entry on the property was lawful, as it held a valid tax deed to the property at that time. Therefore, we find that the trial court correctly concluded that Durden is not entitled to the value of the improvements, even though the County knew of Durden's competing claim and its title was ultimately held to be invalid. (Appendix to Petition for Writ of Certiorari, p. 11a.)

The Georgia court also quoted with approval the following from the decision of the trial court:

> Any contrary ruling would require the condemnor to pay twice for the improvements which it constructed and would provide the condemnee a windfall. Condemnee Durden has offered no other evidence of bad faith on the part of the Condemnor [DeKalb County], and there is no evidence whatsoever that Condemnor believed itself to be anything other than the rightful owner of the property until the decision in the ejectment action in January of 1990. Since notice of an outstanding or competing claim is not evidence of bad faith which would permit a condemnee to recover the value of improvements constructed by the condemnor and reap a windfall, Condemnor is entitled to judgment on its motion. (Appendix to Petition for Writ of Certiorari, p. 11a.)

Searl was an early departure from the common law rule that a trespasser who built a structure on another's land impliedly dedicated the structure to the landowner. Georgia courts held, even before *Searl,* that the trespasser doctrine does not apply where a condemnor constructed improvements before condemnation under a mistaken, but good faith, belief that it owned the land. In *Young v. McKenzie,* 3 Ga. 31 (1847) a bridge company had only to pay for the value of the land and not for a bridge mistakenly constructed before a valid condemnation. In *Charleston & W. Carolina Ry. Co. v. Hughes,* 30 S.E. 972 (1898) the Supreme Court of Georgia held that "harsh remedies," i.e., the common law rule of forfeiture, will not be allowed against a railroad company having the right of eminent domain and that under its power of eminent domain, the railroad had a right to do acts which would be a trespass for an individual.[3] In *Benton v. Georgia Marble Co.,* 364 S.E.2d 413 (1988), a proceeding by a railroad to condemn a railway line upon expiration of the railroad's lease, the owners were not entitled to compensation for the value of the leasehold improvements made by the Railroad. *Id.* at p. 415.

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[3]The *Hughes* court also held that an owner who stands by and allows improvements for the public good to be erected on the owner's property cannot recover the value of the improvements. The Georgia trial court in granting the County's motion for partial summary judgment made an explicit finding that Petitioner Durden was aware that the County was constructing the garbage collection facility but chose to take no action in an effort to either prevent or delay such construction "apparently in the hope that it would increase the damages which she might recover." The trial court cited this finding of fact as an alternative ground for granting the County's motion for partial summary judgment. (See Appendix for Petition for Certiorari, p. 17a.)

Several federal cases more recent than *Searl* are consistent with *Searl* and the Georgia decisions. See *Anderson-Tully Co. v. United States,* 189 F.2d 192 (5th Cir. 1951), cert. denied, 342 U.S. 826 (1951); *Bibb County, Georgia v. United States of America,* 249 F.2d 228 (5th Cir. 1957); *Alaska v. 13.90 Acres of Land,* 625 F.Supp. 1315 (D. Alaska 1985) aff'd sub nom. *Etalook v. Exxon Pipeline Co.,* 831 F.2d 1440 (9th Cir. 1987).

In *Etalook,* supra, a pipeline company condemned land as part of the Alaskan pipeline project and constructed a road over what turned out to be land owned by a native Alaskan. The pipeline company settled with the owner of the land.

After construction commenced, the owner succeeded in overturning the condemnation proceeding and the settlement. The company then initiated a new condemnation proceeding to perfect the errors in the previous proceeding. The federal court upheld the trial court's refusal to include the value of the improvements erected by the company in the measure of just compensation. First, the court held that the common law rule concerning trespassers did not apply to an entity with power of eminent domain. Second, the common law forfeiture rule had been modified by a state statute to allow one who held title in good faith and under color of title to set off the value of improvements against the damages for trespass. Third, the court held that the Condemnee would be required to pay the trespasser for the value of improvements when he stands by while the trespasser improves the property. *Id.,* at 1445.

All three factors set forth in the *Etalook* decision apply to the present case. First, Georgia law does not treat the condemnee as a mere trespasser. Second, Georgia statutory law (O.C.G.A. §44-11-9) also abrogated the

common law rule and now allows even a private trespasser who holds under color of title and in good faith to recover the full value of any improvements it erects while in possession. In addition, as the trial court specifically found, Petitioner Durden did not take any action to stop the County from building the garbage collection facility on the 7-acre tract and cited that fact as an alternative ground for concluding that Petitioner Durden could not recover the value of the improvements.

In summary, the trial court and the Supreme Court of Georgia following the decision of this Court in *Searl,* and other federal and Georgia decisions consistent with *Searl,* correctly concluded that Petitioner Durden is not entitled to the value of the improvemets, that any contrary ruling would require the County to pay twice for the public improvements without any evidence of bad faith and would provide Petitioner Durden with a windfall. Thus, the trial court and the Supreme Court of Georgia followed the admonition of *Searl* that just compensation must be just to the taxpayers of the County as well as Petitioner Durden.

III.

THE DECISION IN THE EJECTMENT ACTION DID NOT PRECLUDE THE TRIAL COURT'S FINDING OF NO BAD FAITH IN THE SUBSEQUENT CONDEMNATION ACTION.

Petitioner Durden attempts to bypass *Searl,* and the other federal and Georgia decisions consistent with *Searl,* with an argument to the effect that the act of the County in constructing the improvements on the 7-acre tract during the pendency of the ejectment action was *ipso facto* not a good faith act, i.e., bad faith as a matter of law. (Petition for Certiorari, p. 13.) In support of this argument Petitioner cites *Harper v. Durden,* 170

S.E. 45 (1933); *Zugar v. Tennessee A&G Railway Co.*, 65 Ga. App. 658, 16 S.E.2d 149 (1941); *rev'd.* 193 Ga. 386, 18 S.E.2d 758 (1942). Neither of these decisions support Petitioner Durden's argument. In *Harper* the Supreme Court of Georgia held that:

> One may be the possessor of land in good faith, though aware of an opposing claim (where such knowledge would not of itself impute bad faith), if he enters in full confidence of his title or the title of one under whom he immediately claims. . . . *Id.* at P. 48-49.

In *Zugar,* the Georgia Court of Appeals did hold that defendant's cutting of trees while suit was pending made his trespass willful and not in good faith. However, the Georgia Supreme Court reversed that decision and held "notice or knowledge of an adverse claim does not destroy the bona fide character of a reasonable and honest claim by one in possession unquestionable." *Id.* at 762. And on remand, the Court of Appeals vacated its entire opinion. *Zugar,* 19 S.E.2d 436 (1942).

Harper and *Zugar* are directly contrary to the *ipso facto* argument made by Petitioner. Thus, the fact that the County began construction of the facility after the ejectment action was filed does not constitute bad faith *ipso facto,* i.e., as a matter of law.

Petitioner also argues that the judgment against the County in the ejectment action is res judicata as to the "issue of good faith versus bad faith" in the condemnation action. (Petition for Certiorari, p. 15.) Here, Petitioner is arguing issue preclusion:

> In Georgia, the prerequisites to the application of the doctrine of issue preclusion are: (1) that the issue at stake be identical to the one involved in the prior litigation; (2) that the issue has been actually

> litigated in the prior litigation; and (3) that the determination of the issue in the prior litigation has been a critical and necessary part of the judgment in the earlier action. *Nix v. Hardison*, 712 F.S. 185, 189 (N.D.Ga. 1989).

Since issue preclusion is an affirmative defense, Petitioner has the burden of proof and must establish the identity of issues with "clear proof" without the identity of issues being uncertain, indefinite or based on inference. *Glen Oak, Inc. v. Henderson*, 369 S.E.2d 736, 738-39 (Ga. 1988). Petitioner fails to carry that burden of proof. Clearly good faith was an issue in the condemnation action, with the trial court making a specific finding that Petitioner had offered no evidence of bad faith on the part of the County. However, there is nothing in the ejectment judgment or elsewhere in the record of this case to suggest that the issue of bad faith versus good faith was litigated in the ejectment action or that the trial court gave any consideration to such issue in concluding that the tax sale was an excessive levy. Consequently, the decision in the ejectment action did not preclude the trial court's finding of no bad faith on the part of DeKalb County in the subsequent condemnation action and the application of *Searl* to the facts of this case, and no basis exists to support Petitioner's claim that a misapplication of the principle of res judicata by the state courts violated her rights to due process and equal protection. There being no such constitutional support, the conclusiveness or not of a state court judgment is solely a concern of state law. *Koningsberg v. State Bar of California*, 366 U.S. 36, 4481 S.Ct. 997 (1961).

CONCLUSION AND PRAYER

This case presents no question other than the application of a well-established decision of this Court to the facts of this particular case. Accordingly, Respondent prays that the Court deny the Petition for Writ of Certiorari on the grounds that the decisions of the trial court and the Supreme Court of Georgia were not in error and that the case presents no issue appropriate for the Court's review.

Respectfully submitted,

ROBERT H. WALLING
(Counsel of Record)
Georgia Bar No. 735000
Suite 953, Wachovia Building
315 West Ponce de Leon Avenue
Decatur, Georgia 30030
(404) 377-2520

JONATHAN A. WEINTRAUB
Georgia Bar No. 746459
Fifth Floor
Maloof Center
1300 Commerce Drive
Decatur, Georgia 30030
(404) 371-3011

Attorneys for Respondent, DeKalb County, Georgia.

September 9, 1994

APPENDIX I

Order in ejectment action granting plaintiff Durden's motion for summary judgment

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

CIVIL ACTION FILE
NO. 87-1136-3

LIZZIE DURDEN, ADMINISTRATRIX OF THE ESTATE OF MARY FREEMAN (DECEASED),

Plaintiff,

v.

DEKALB COUNTY, GEORGIA,

Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

1. Plaintiff is the successor-in-interest to the Jim and Mary Freeman named in that certain Warranty Deed from Dr. B.F. Anderson dated December 20, 1945 . . . .

2. The property which is the subject matter of this dispute is described in a purported tax deed held by Defendant . . .

3. [OMITTED]

4. The Defendant's sole claim to the property is by virtue of the aforesaid tax deed. The tax deed resulted

from a tax execution which issued against a George Anderson who had filed a real property tax return on the Subject Property in 1959. The tax execution was for 1974 and 1975 taxes on the Subject Property.

5. The Subject Property is a 30 acre tract . . . . According to the 1975 tax digest, the County Board of Tax Assessors had placed an actual fair market value on the Subject Property in excess of $30,000.00.

6. The Tax Commissioner of DeKalb County levied upon and sold the entire 30 acre tract for the sum of $780.49. This levy on 30 acres to satisfy a $780.49 tax bill constituted an excessive levy as a matter of law.

7. The tax deed . . . issued pursuant to an excessive levy is void and, therefore, the Defendant's tax deed is void.

8. The Subject Property was vacant land at the time this suit was filed.

9. Plaintiff, by virtue of the Warranty Deed and prior possession of the Subject Property, is entitled to prevail in its action for ejectment as a matter of law.

Based on the foregoing findings, Plaintiff's Motion for Summary Judgment is GRANTED and it is

ORDERED AND ADJUDGED that Plaintiff have and recover the possession of [the Subject Property] over and against the Defendant; that a Writ of Possession issue instanter . . . .

IT IS SO ORDERED this 31st day of January, 1990.

/s/ Clarence F. Seeliger
CLARENCE F. SEELIGER, JUDGE
Stone Mountain Judicial Circuit